IN THE

United States Circuit Court of Appeals for the Ninth Circuit

M. A. PHELPS LUMBER CO., a corporation.

Appellant,

vs.

McDONOUGH MANUFACTURING CO., a corporation,

Appellee.

No. 2167.

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

APPELLANT'S PETITION FOR RE-HEARING.

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Appellant respectfully petitions the above entitled court for a re-hearing on the opinion filed February 3, 1913.

The opinion is based upon the theory that the machinery furnished by appellee became permanently attached to the realty and that it was the intention of the parties that it should become a fixture within the legal definition of that term.

The Washington laws provide for a lien upon real estate *only*.

> *Remington & Ballinger's Annotated Codes & Statutes, of Washington,* Section 1129;
> *Fuller & Co. vs. Ryan,* 44 Wash. 385, 7; 87 Pac. 485, 6;
> 27 *Cyc.* 31.

When chattels have lost their identity as such and have become merged into real estate and have become a part thereof, then a right to a lien is given, and not until then.

> *American Radiator Co. vs. Pendleton,* 62 Wash. 56, 7; 112 Pac. 1117;
> *Gasaway vs. Thomas,* 56 Wash. 77, 9; 105 Pac. 168;
> 27 *Cyc.* 38.

The question then is, Did the machinery become a part of the realty?

Appellant was bound to allege and prove the existence of three things before the court could, under the authorities, answer this question in the affirmative:

"The true criterion of a fixture is the united application of these requisites: (1) Actual annexation to the realty, or something appertaining thereto; (2) application to the use or purpose to which that part of the realty to which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold."

> *American Radiator Co. vs. Pendleton,* 62 Wash. 56, 7 and 8; 112 Pac. 1117;
> *Gasaway vs. Thomas,* 56 Wash. 77, 9; 105 Pac. 168;

Filley vs. Christopher, 39 Wash. 22, 5; 80 Pac. 834.

"An evident corollary of the modern rule thus established is that the burden of showing the existence of these requisites for merger, including the intention, is upon the party claiming the chattel to have become merged in the realty * * *.

"As to the intention, of course, it is not the unrevealed, secret intention that controls. It is the intention indicated by the proven facts and circumstances, including the relation, the conduct, and the language of the parties—the intention that should be inferred from all these."

Hayford vs. Wentworth (Me.), 54 Atl. 940, 1.

The appellee did not plead actual annexation, application, nor intention to make a permanent accession. Furthermore, the appellee did not offer any evidence for the purpose of proving such facts. Evidence is given effect only as proof of the facts which the one introducing it was seeking to prove with it. That such is the law is too well settled to require citation of authorities.

In the opinion it is said:

"We think there was an allegation and evidence in that respect sufficient to justify the decree of the court below. It appears from the testimony that the material and machinery were designed and manufactured to fit a certain building, that the machinery was all placed in the building and became a part of the mill; that bridge ties were run out from the sides of the mill after the machinery was placed in it, to which the machinery was bolted, that there were three large stationary steam boilers, that steam and water pipes connected them with other portions of the machinery, and that the boilers were set upon a masonary foundation with 'Dutch Oven

Work' of brick and fire clay underneath them, and that the entire plant was put into acutal operation for the manufacture of lumber, lath and planing-mill products."

Appellee directed the court's attention to the transcript, pages 9, 74, 100, 142, 161, 171, 173, 176, 281, 283, 404, 406, 409, 424, 426, 432, 451 and 462 for evidence showing annexation, application, and intention to make a permanent accession to the realty. There is nothing else in the record which could even be termed "evidence" of such facts. *The evidence disclosed in the record was not introduced for the purpose of proving that the machinery became fixtures.* The most that can be said is that an inference might be drawn from some of the evidence that some of the heavier parts of the machinery were fastened more or less securely in place. The court was not entitled to use the evidence for that purpose nor to draw the inference.

"It is plain that without some other facts, a court can not say as a matter of law that 'one steam boiler, one steam engine, one still complete, one doubler, one worm and worm tub, and one large tank,' are fixtures *pre se.* Nor is the court competent to draw from the evidence, however clear and uncontradicted it may be, an inference of the facts necessary to make them so."

Campbell vs. O'Neil, 64 Pa. St. 290, 2.

"The only evidence of actual annexation to the realty, besides their presence in the buildings, is the fact that the machines were fastened in place by lag screws. This is a screw with a nut head which may readily be turned by a wrench. This adjustable fastening held them to the floors, so that when in use they might not be jarred out of position by the motion of communicated power. None, even of the heavier and larger ones, were annexed

in any permanent way to the buildings or real estate. There is no evidence which indicates any intention that these machines should become either temporarily or permanently, a part of the freehold. * * * To determine that there has been a conversion, there must be evidence which shows an annexation of a character to indicate that there is a purpose to make the chattel a part of the realty. * * *

"The proofs in this case do show one of the elements necessary to support a conversion of chattels into realty. The machines were used for the same purpose to which the realty was appropriated. But this is not enough. All of the essential incidents must co-exist in order to effect a conversion. In this case there is no sufficient showing, either of an actual annexation of the machines, or of an intention to make them part of the freehold * * *."

Knickerbocker Trust Co. vs. Penn. Cordage Co. (N. J.), 50 Atl. 459, 65 and 66.

"Whether this machinery had been annexed to the realty, and by the annexation a permanent accession to the freehold was intended, is not shown by the evidence. Courts cannot know otherwise than through the medium of evidence the particular facts necessary to convert this character of property primarily personal into fixtures, or parts of the realty in connection with which it may be used. The burden of proving such facts, if from them they could derive benefit, rested upon the complainants. As the case is now presented by the evidence, the machinery must be deemed the personal property of the corporation in determining the character of the transfers to the appellants."

Bank of Opelika vs. Kizer (Ala.), 24 So. 11, 14.

See also:

Haas Etc. Co. vs. Springfield Etc. Co. (Ill.), 86 N. E. 248, 52 and 53;

Johnson vs. Moser (Ia.), 47 N. W. 996;
Parker vs. Blount Co. (Ala.), 41 So. 923;
5 *Encyc. of Evi.* 757.

There is no evidence in the record from which it could have been determined by the court that any of the machinery or supplies had been annexed to the realty, much less that there was an intention that the whole or any part was intended to become permanently attached. The evidence goes no further than to show that certain chattels were furnished appellant to be used in a sawmill. Evidence showing whether or not they were annexed to the realty, the manner of attachment, if attached, and the intention to permanently attach, is wholly wanting.

Appellee did not attempt to prove facts showing that the machinery became fixtures. On the other hand there is positive evidence that it was intended that the machinery should not become a part of the realty or fixtures.

In the contract it is provided that the "title to the property mentioned above shall remain in the consignor until fully paid for in cash" (Transcript, 10). Such a provision is positive evidence negativing an intention that the chattels should become fixtures.

"And the stipulation of the vendor in each of these cases, that the title to the property furnished by it should not pass until it had been paid for by the purchaser, precludes the idea that either of them intended that the machinery furnished by it should become a part of the realty until payment had been made; as to impute a different intention would be to suppose that neither intended the benefit of a stipulation exacted with the greatest care in its own behalf. In such case the in-

tention of the purchaser must be regarded as subordinate to the prior intention of the vendor, expressed in the agreement by which he has possession of the property."

Case Manuf'g. Co. vs. Garver (Oh.), 13 N. E. 493, 7.

"The case is ruled by Adams vs. Lee, 31 Mich. 440, and Robertson vs. Corset, 39 Mich. 777. In Adams vs. Lee the court said: 'All the time, therefore, the parties have had title to the machinery distinct from their title to the land, and this fact of itself is conclusive that the former was personalty, for to constitute a fixture there must not only be physical annexation in some form to the realty, but there must be unity of title, so that a conveyance of the realty would of necessity convey the fixtures also. When the ownership of the land is in one person, and of the thing affixed to it is in another, and in its nature is capable of severance without injury to the former, the latter cannot, in contemplation of law, become a part of the former, but must necessarily remain distinct property, to be used and dealt with as personal estate only."

Lansing Iron & Engine W'ks. vs. Walker (Mich.), 51 N. W. 1061, 2.

"There could be no clearer expression of an intention than an agreement that the property should remain the property of the vendor, although placed in possession of the proposed purchaser."

Harris vs. Hackley (Mich.), 86 N. W. 389, 90.

See also:

Harkey vs. Cain (Tex.), 6 S. W. 637, 9;
General Electric Co. vs. Transity Equipment Co. (N. J.), 42 Atl. 101, 5;
Campbell vs. Roddy (N. J.), 14 Atl. 279, 81;
John Van Range Co. vs. Allen (Miss.), 7 So. 499;

Cherry vs. Arthur, 5 Wash. 787, 8; 32 Pac. 744;
Washington National Bank Etc. vs. Smith, 15 Wash. 160, 69 and 70; 45 Pac. 736;
Holly Mfg. Co. vs. New Chester Water Co., 48 Fed. 879, 87; 53 Fed. 19;
19 *Cyc.* 1048;
Smith vs. Bay St. Sav. Bank (Mass.), 88 N. E. 1086, 8;
Buzzell vs. Cummings (Vt.), 18 Atl. 93, 4;
Hawkins vs. Hersey (Me.), 30 Atl. 14, 15;
Lansing Etc. Wks. vs. Wilbur (Mich.), 69 N. W. 667, 8;
Warren vs. Liddell (Ala.), 20 So. 89, 92;
N. W. Mutual Life Ins. Co. vs. George (Minn.), 79 N. W. 1028.

The writer of the opinion says about this contention and the foregoing authorities:

"Those authorities are all aside from the question which is before us The question here is whether the appellee's right to claim a mechanic's lien has been waived by the terms of the contract."

Appellant respectfully urges that the question of intention *is* before the court and that these authorities are squarely in point and the law laid down therein is sound and applies to this controversy. The provision of the contract simply constitutes *evidence* of an intention not to make the machinery a permanent accession to the freehold. It is not claimed by appellant that it constitutes a *waiver* of a right of lien, if there were an intention to make this machinery a permanent accession. The question before the court was whether or not appellee proved that this machinery became a fixture. A right

of lien must exist before it can be waived. Appellant contends that there is no proof that a right of lien ever came into existence.

Returning to the allegation which was considered sufficient by the writer of the opinion. It was alleged that the machinery "was sold and delivered to the defendant for use in the *erection of a sawmill* * * * and was by said defendant used in the erection of said sawmill upon said premises" (Transcript, 7).

Appellant submits that the allegation that the machinery was used in the erection of a sawmill is not the equivalent of an allegation of actual annexation to the realty, application to the use for which the realty was appropriated, and intention of the party making the annexation to make a permanent accession to the freehold.

Sawmills are of two kinds, permanent and temporary. The same machinery is used in each kind and in both cases it must be bolted so that it will not vibrate too much. The latter are put up where the supply of timber is limited. This is common knowledge. That allegation may refer to one as well as to the other. Technical pleading is no longer required but the material facts must still be alleged and proved. Accuracy is still a requisite. The opinion sets a precedent for loose pleading.

Evidently the pleader did not have in mind that it was necessary to allege or prove those facts and the

allegation was not intended to have the effect given it.

It is respectfully submitted that appellant should be granted a re-hearing.

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It is hereby certified by Jas. A. Williams, a member of the firm of Danson, Williams & Danson, counsel for appellant, that in his judgment the foregoing petition for a re-hearing is well founded. That it is not interposed for delay.